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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,
v.
AMERICAN STORES CO.,
ALPHA BETA ACQUISITION CORP.,
and LUCKY STORES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I. SECTION 16 AND ITS LEGISLATIVE HISTORY ESTABLISH THAT PRIVATE PARTIES MAY NOT OBTAIN DIVESTITURE	3
II. RECENT MERGER LAW AMENDMENTS DEMONSTRATE CONGRESS' CONTINUING INTENTION THAT STATES MAY NOT OBTAIN DIVESTITURE	6
III. POLICY CONSIDERATIONS REQUIRE THAT STATES AND PRIVATE PARTIES BE DENIED DIVESTITURE RELIEF	9
CONCLUSION	15

TABLE OF AUTHORITIES

CASES: Page

Bell v. *New Jersey*, 461 U.S. 773 (1983) 8
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 9
Bobsee Corp. v. *United States*, 411 F.2d 231 (5th Cir. 1969) 8
CIA. Petrolera Caribe, Inc. v. *Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985) 5, 6
Cargill, Inc. v. *Montfort of Colorado, Inc.*, 479 U.S. 104 (1986) 11
FEA v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976) 8
First Nat'l Bank of Logan v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966) 9
General Elec. Co. v. *Southern Constr. Co.*, 383 F.2d 135 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968) 4
IT&T Corp. v. *GTE Corp.*, 518 F.2d 913 (9th Cir. 1975) 4
Lieberman v. *FTC*, 771 F.2d 32 (2d Cir. 1985) 8, 12
Mattox v. *FTC*, 752 F.2d 116 (5th Cir. 1985) 11, 12
NBO Industries Treadways Co. v. *Brunswick Corp.*, 523 F.2d 262 (3rd Cir. 1975), *rev'd on other grounds*, 429 U.S. 477 (1977) 5
Philbrook v. *Glodgett*, 421 U.S. 707 (1975) 8
Richerson v. *Jones*, 551 F.2d 918 (3rd Cir. 1977) 4
Russello v. *United States*, 464 U.S. 16 (1983) 4
Seatrain Shipbuilding Corp. v. *Shell Oil Co.*, 444 U.S. 572 (1980) 8
United States v. *E.I. duPont de Nemours*, 366 U.S. 316 (1961) 13
Water Quality Ass'n Employees' Benefit Corp. v. *United States*, 795 F.2d 1303 (7th Cir. 1986) 4

STATUTES:

Clayton Act ..... passim
15 U.S.C. § 25 3
15 U.S.C. § 26 3

TABLE OF AUTHORITIES—Continued

Page

Hart-Scott-Rodino Antitrust Improvements Act of 1976 ..... passim
Clayton Act §§ 4C-4H, 15 U.S.C. § 15c-15h 7
Clayton Act § 7A, 15 U.S.C. § 18a 6
15 U.S.C. § 18(a) (i) & (e) (1) 13

LEGISLATIVE MATERIALS:

H.R. Rep. No. 1373, 94th Cong., 2d Sess. (1976) 7, 13, 14
S. Rep. No. 803, 94th Cong., 2d Sess., pt. 1 (1976) 6, 7, 14
122 Cong. Rec. 30,868 (1976) 8

OTHER AUTHORITIES:

U.S. Dept. of Justice, Merger Guidelines (June 14, 1984) 10
56 Antitrust & Trade Reg. Rep. (BNA) No. 1421 (June 22, 1989) 10
56 Antitrust & Trade Reg. Rep. (BNA) No. 1414 (May 4, 1989) 10

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BRIEF OF THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. The Roundtable was founded in 1972 in the belief that business executives should take an increased and open role in continuing debates about public policy. The interest of The Business Roundtable includes the way in which the antitrust laws are shaped, interpreted, and enforced.[1]

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[1] Pursuant to Rule 36.2 of the Rules of the United States Supreme Court, this brief is filed with the consent of both petitioner and

The member companies of the The Business Roundtable are substantial enterprises, but they are nonetheless subject to ever increasing competitive pressure from other substantial enterprises throughout the world. The Roundtable members recognize that under established law the federal government can seek divestiture if a merger or acquisition subsequently threatens competitive harm. They are, however, seriously concerned about an expansive interpretation of the antitrust law that would give 50 states and any private party the right to seek the breakup of existing enterprises.

The parties have necessarily focused their arguments on the facts of this case and have not stressed the impact a decision will have on the business community as a whole. The precedent established here is vitally important to the business community. If this Court permits private parties to secure divestiture, despite the fact that the federal antitrust enforcement agencies have approved a transaction, the parties to a merger will face a high level of uncertainty. The mere pendency of a state investigation or the knowledge that a competitor wants to prevent an efficiency-enhancing transaction may effectively kill a merger because the parties cannot be sure that a closing is final. The combined organization could be deterred from integrating its operations to maximize efficiencies and to eliminate redundant facilities if it is threatened with divestiture actions by private parties. The Business Roundtable submits this brief in order to emphasize the practical and policy implications involved in this case and to underscore the need to affirm the decision below.

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respondents. Copies of letters of consent from the parties are being filed herewith.

SUMMARY OF ARGUMENT

This brief will not address the facts of this particular case, but will rather focus on the broad question whether the states and private parties have the same right to obtain divestiture relief as does the federal government. Without repeating the exhaustive discussion contained in respondents' brief, this amicus brief will show that there is a clear distinction in the Clayton Act between the injunctive remedies available to the federal government and private parties. This distinction was noted when the antitrust laws were amended as recently as 1976, and Congress did not eliminate it. Moreover, the policy justifications for the distinction are more compelling today than they were when the Clayton Act was enacted.

ARGUMENT

I. SECTION 16 AND ITS LEGISLATIVE HISTORY ESTABLISH THAT PRIVATE PARTIES MAY NOT OBTAIN DIVESTITURE.

Petitioners here claim that private parties should have the same right that the federal government has to obtain divestiture relief in merger cases. The short answer is that Congress obviously intended to differentiate between the remedies available to the federal government and those available to private parties because it used different words to describe those remedies.

Federal injunctive relief is authorized by Section 15 of the Clayton Act, 15 U.S.C. § 25, which refers to "proceedings in equity to prevent and restrain" violations. Private injunctive relief is authorized by Section 16 of the Clayton Act, 15 U.S.C. § 26, which refers to "injunctive relief * * * against threatened loss or damage" or "against threatened conduct that will cause loss or damage" under standards applied "by courts of equity." Petitioner's brief refers repeatedly to Section 16 as if it had been enacted in isolation; Section 15 is mentioned

only once in passing. (Petitioner's Brief at 39). But Sections 15 and 16 were passed at the same time, and Congress was aware of the scope of the federal government's remedy when it passed Section 16. Congress must have had *some* reason for using different language to describe the private injunctive remedy.

Familiar principles of statutory construction provide that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). *Accord, e.g., Water Quality Ass'n Employees' Benefit Corp. v. United States*, 795 F.2d 1303, 1307-8 (7th Cir. 1986); *Richerson v. Jones*, 551 F.2d 918, 928 (3rd Cir. 1977) (" 'where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed' ") (*quoting General Elec. Co. v. Southern Constr. Co.*, 383 F.2d 135, 138 n.4 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968). Petitioner's brief does not provide any explanation whatever for the differences in the words used to describe federal remedies in Section 15 and private remedies in Section 16.[2]

The legislative history of the Section 16 private injunctive remedy has been reviewed in two leading cases that reached opposite results. *Compare IT&T Corp. v. GTE Corp.*, 518 F.2d 913, 920-24 (9th Cir. 1975) (divestiture

[2] Petitioner's brief also does not provide any explanation for the references to prospective conduct in Section 16 that are not paralleled in Section 15. As respondents' brief shows in detail, the language of Section 16 itself speaks in prospective terms. It uses such phrases as *"threatened* loss or damage" and *"threatened* conduct that *will* cause loss or damage" (emphasis added). These are the phrases one would expect to find in a statute authorizing a prohibitory injunction to prevent possible future unlawful conduct, but not the language one would expect in a statute authorizing divestiture to cure a past violation.

not available to private parties) *with CIA. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 413-29 (1st Cir. 1985) (divestiture available to private parties). Considerable additional detail has been supplied in respondents' brief. This brief will not burden the Court with a recapitulation of the history set forth in these sources, but two points should be emphasized.

First, both opinions recognize that there is support in the legislative history for the conclusion that Congress intended to make divestiture available to the federal government and unavailable to private parties. The *CIA. Petrolera* opinion argues that this support is not compelling, 754 F.2d at 427, but respondents have demonstrated that the legislative history is more persuasive than the First Circuit opinion recognizes. It is also significant, however, that the *CIA. Petrolera* court, like petitioner, provides no alternative explanation whatever to account for the fact that Congress chose to use different words to describe federal and private remedies.

Second, the court in *CIA. Petrolera* candidly admitted that it would be inclined to ignore contemporary Congressional intent, even if that intent had been entirely clear:

> We do not believe that a court can ignore the contemporary legal meaning and scope of words employed in statutes and base its interpretation of the plain language solely on what it surmises was the meaning of the words at the time of original enactment. [754 F.2d at 418]

Later, the First Circuit stated that courts should not be confined by "the pronouncements of statesmen long deceased." 754 F.2d at 427, *quoting NBO Indus. Treadways Co. v. Brunswick Corp.*, 523 F.2d 262, 278-79 (3rd Cir. 1975), *rev'd on other grounds*, 429 U.S. 477 (1977).

The *CIA. Petrolera* court justified its cavalier attitude toward the interpretation of statutes principally by refer-

ence to quotations about flexible interpretation of the Constitution. 754 F.2d at 418. It may be appropriate to interpret the Constitution to apply to situations not specifically contemplated by the nation's founders, but the First Circuit's analogy to Constitutional interpretation is inapt here. As the language and legislative history of Section 16 plainly shows, Congress contemplated a distinction between private and federal remedies. That intention should not be disregarded. As discussed below, this is particularly true when "statesmen" who are not "long deceased" have recognized the distinction and preserved it.

II. RECENT MERGER LAW AMENDMENTS DEMONSTRATE CONGRESS' CONTINUING INTENTION THAT STATES MAY NOT OBTAIN DIVESTITURE.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Hart-Scott-Rodino Act") amended the Clayton Act to provide that significant mergers had to be notified in advance to both the Department of Justice and the Federal Trade Commission. Clayton Act § 7A, 15 U.S.C. § 18a. The purpose and effect of premerger notification is to prevent substantial corporations from consummating significant mergers in secret, and to give the federal antitrust enforcement agencies a chance to examine the competitive effects of proposed mergers in advance. The Senate Judiciary Committee agreed with the Justice Department's view that "[premerger] notification would provide us with time to develop the information needed to insure a thorough evaluation of whether the proposed merger should be challenged. • • • [It] will prevent the consummation of so-called 'midnight' mergers designed to subvert the Department's authority to seek preliminary relief." S. Rep. No. 803, 94th Cong., 2d Sess., pt. 1 at 64-65 (1976) (hereinafter cited as "S. Rep. No. 803"). The Hart-Scott-Rodino Act provides an alternative way for private parties to be heard on merger effects, and by facilitating advance scrutiny of mergers

it lessens the importance of the divestiture remedy. H.R. Rep. No. 1373, 94th Cong., 2d Sess. 7-11 (1976) (hereinafter cited as "H.R. Rep. No. 1373").

Separate provisions of the Hart-Scott-Rodino Act also authorized states to bring *parens patriae* antitrust actions for injuries suffered by their citizens. 15 U.S.C. §§ 15c-15h.[3] When the Hart-Scott-Rodino Act was passed, Congress considered authorizing states to seek divestiture. Indeed, the Senate version of the legislation contained language "intended to insure the court's power to grant any kind of appropriate relief, including rescission, restitution and divestment, which may be appropriate remedies under certain circumstances, whether or not it fits within the traditional concept of 'equitable relief' or 'injunctive relief'." S. Rep. No. 803 at 45. However, the Conference Committee expressly chose *not* to authorize such mandatory equitable relief. Congressman Rodino, the Chairman of the House Judiciary Committee and sponsor of the legislation, explained why mandatory remedies were not provided:

> The compromise bill authorizes only monetary relief. That is because restitution seems unnecessary in light of the broad authority for damage recoveries conferred by the compromise bill. As for injunctive relief, the compromise bill omits any reference to it solely because such relief is already available to State attorneys general, acting as parens patriae in injunctive actions under the Clayton Act, 15 United States Code, section 26. The compromise bill, therefore, in no way alters the current case law on parens patriae injunctive relief. *Provision for equitable relief; that is, decrees of divestiture, was squarely rejected by the House conferees in the belief that State attorneys general should not be authorized to file parens suits*

[3] Petitioner here purports to sue as *parens patriae*. Pet. App. A-6. Thus, it is particularly relevant whether the legislation authorizing *parens patriae* litigation permits the states to obtain divestiture.

seeking divestiture. [122 Cong. Rec. 30,868 (1976) (emphasis added)].

This authoritative statement by Congressman Rodino is significant.[4] Rejection of a divestiture remedy for the states by a Congressional Conference Committee is not the same thing as rejection by a floor vote, but it demonstrates that as recently as 1976 authoritative Congressional spokesmen recognized the difference between private remedies and federal government remedies, and Congress chose to preserve the difference.[5]

This Court has repeatedly looked to positions Congress previously considered and rejected in determining the appropriate meaning of a statute. Here, in 1976 Congress considered giving the states authority to seek divestiture and specifically rejected such proposed legislation. Congressional rejection of proposed legislation is compelling evidence that Congress did not intend to adopt that particular view. *See, e.g., Philbrook v. Glodgett*, 421 U.S. 707, 718-19 (1975) (Congress' repeated rejection of Senate attempts to restore to states discretion in coverage

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[4] Since there was no Conference Committee Report on the Hart-Scott-Rodino Act, Congressman Rodino's statement is authoritative. *See Lieberman v. FTC*, 771 F.2d 32, 39 (2d Cir. 1985). Moreover, Congressman Rodino's interpretation of the Hart-Scott-Rodino Act is particularly instructive: "[a]s a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute." *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

[5] As this Court unanimously held in *Bell v. New Jersey*, "the view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive value." 461 U.S. 773, 784 (1983). *See also Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) ("[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure"); *Bobsee Corp. v. United States*, 411 F.2d 231, 237 n.18 (5th Cir. 1969) (subsequent congressional statements are entitled to careful consideration "as a secondarily authoritative expression of expert opinion").

of program is compelling evidence of Congressional intent to make coverage requirements mandatory and uniform); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 732-33 (1975) (Congress' failure to adopt proposed limitation on securities laws that would have reversed judicial interpretation is significant evidence of Congressional intent to accept interpretation); *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 258 (1966) ("The intent of the Congress to leave the question of the desirability of branch banking up to the States is indicated by the fact that the Senate struck from the House bill the time limitation, thus permitting a subsequent change in state law to have a corresponding effect on the authority of national banks to engage in branching").

Congress' decision to restrict private remedies in 1914 is not just an archaic notion that has been outmoded by time. It is rather a choice that was reaffirmed in modern times, and one that is actually even more compelling today.

III. POLICY CONSIDERATIONS REQUIRE THAT STATES AND PRIVATE PARTIES BE DENIED DIVESTITURE RELIEF.

Private and state enforcement of the antitrust laws are important supplements to federal enforcement in many areas. If, for example, private parties or state attorneys general prosecute price-fixing conspiracies among competitors, there is a positive public benefit and virtually no potential for conflict with national competitive policies. The applicable legal principles are relatively clear, and have been settled for a long time. In some areas, however, the risk of conflict between private and local objectives and federal objectives is serious. The merger law is one such area.

It is universally recognized that mergers can achieve important efficiencies and benefit the public. For example, the Department of Justice Merger Guidelines state:

> Although they sometimes harm competition, mergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets. * * * The primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers. [U.S. Dept. of Justice, Merger Guidelines §§ 1, 3.5 (June 14, 1984)].

The appropriate policy toward mergers is a subject of national concern and debate. The Court may take notice of the fact that the commercial world is shrinking and that U.S. industries face increasingly vigorous competition from overseas competitors. Nations who are major trading rivals of the United States have, or are moving toward, a broad coordination of competitive policies.[6] Fragmented or balkanized merger-law policies will impose a real burden on interstate commerce and impair the overall competitiveness of U.S. industry.

It is not safe simply to assume that private parties or even state attorneys general are guided by the same national concerns when reviewing mergers. Competitors, for example, may have a strong incentive to thwart efficiency-creating mergers precisely because they create efficiencies and therefore portend a more vigorous competitive environment. That is why this Court held that it is important to apply standing rules to screen out competitor suits that seek to apply the merger law in anticompetitive ways. *See Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. 104 (1986) (denying standing to a competitor who failed to assert or prove antitrust injury).

[6] Presently, the European Community Commission is working on unified merger guidelines in anticipation of the unification of the European Economic Community in 1992. *See* 56 Antitrust & Trade Reg. Rep. (BNA) No. 1414, at 688-89 (May 4, 1989). The Administration has been examining the probable consequences flowing from the European community's program to develop a single internal market by 1992. The Administration's newly-formed Council on Competitiveness has announced that one of its primary goals will be to "strengthen U.S. competitiveness in world markets, with specific emphasis on ways to ensure that U.S. regulatory policy does not hinder the ability of U.S. firms to compete with EC rivals." *See* 56 Antitrust & Trade Reg. Rep. (BNA) No. 1421, at 896-97 (June 22, 1989).

Policy conflicts are also present when states enforce the merger laws. States may use the antitrust laws to prevent mergers that threaten no competitive harm, but may cause local economic dislocation. Efficiencies that benefit consumers may be created, for example, if different manufacturing operations or headquarters staffs are consolidated in one location. This consolidation will obviously have adverse employment effects in one state or another, which may have a strong motivation to block an efficiency-enhancing merger for these reasons.[7]

The problems created by conflicting state and federal merger policies have been recognized in recent decisions. Both *Mattox v. FTC*, 752 F.2d 116 (5th Cir. 1985), and

[7] For example, North Carolina and South Carolina entered into an agreement with West Point-Pepperell, Inc. in connection with its acquisition of J.P. Stevens & Co. that contained the following provisions:

> 1. [West Point] will make every effort to continue to operate a Greenville management center, will work toward keeping a substantial presence there, and will maintain as many employees as are consistent with the efficient operation of its business; 2. West Point will provide preferential consideration to former Stevens managerial personnel for any opening for which they are qualified; 3. For two years, West Point agrees not to close any plants and to make all reasonable, good faith, efforts not to reduce current employment levels; 4. Community services by management and employees will be actively promoted; 5. West Point will continue use of and maintain present contracts with local vendors provided price and quality are competitive.

Letter dated May 4, 1988, from West Point-Pepperell, Inc. to Governor Carroll Campbell, Hon. T. Travis Medlock, and Hon. Lacy B. Thornburg.

Lieberman v. FTC, 771 F.2d 32 (2d Cir. 1985), held that states were not authorized to obtain premerger materials filed with the federal government under the Hart-Scott-Rodino Act. The immediate issue was different, but the policy rationale is instructive. Both courts recognized that an overriding concern for a uniform national policy concerning large mergers was a basis for denying access to premerger filings by state attorneys general. In *Mattox*, the Fifth Circuit stated:

> Because [the Hart-Scott-Rodino Act] only covers transactions likely to affect the entire national economy, Congress may have wanted to centralize regulation of such mergers in the FTC and the Justice Department. Disclosure to state attorneys general would tend to balkanize that needed centrality. [752 F.2d at 122].

The Second Circuit addressed the same policy issues in *Lieberman*:

> [G]iving state authorities the premerger information and the chance to bring suit more easily might well mean big delays in the fast world of mergers—delays Congress has not countenanced. We doubt if Congress would have intended to have the staffs of fifty state attorneys general sitting as oversight committees reacting to [FTC] or Justice Department decisions whether to block large-scale mergers of national or international significance. [771 F.2d at 40].

We do not suggest, of course, that the states or private parties are disabled from enforcement of the federal merger law. They are entitled to the remedies that Congress has provided. But in light of the potential conflicts in enforcement philosophy, there is no policy reason to expand available remedies by interpreting Section 16 to permit relief that Congress did not intend to provide.

The Congressional choice was not arbitrary; there is a principled distinction between prohibitory injunctive relief and divestiture. Prohibitory injunctions are serious

and even a temporary delay can effectively kill a merger. But interruption of future plans is still far less serious than disruption of an existing integrated enterprise. There is no statute of limitations on enforcement of the merger law; federal authorities can obtain divestiture many years after the original combination. *United States v. E.I. duPont de Nemours*, 366 U.S. 316, 326-29 (1961). If petitioners were to prevail here, private parties enforcing the antitrust laws for private gain might be able to obtain divestiture many years after a merger is consummated. It was entirely rational for Congress to provide that divestiture, which can cause such massive disruption, is a remedy that should be reserved to the federal government.

There is, in fact, far less need for private divestiture relief today than there was in 1914. As explained above, under the Hart-Scott-Rodino Act, the Federal Trade Commission and the Department of Justice now have the opportunity to review significant mergers in advance. In the course of this review, these antitrust agencies can and do solicit the views of private parties and other governmental entities. Moreover, private parties and state attorneys general also can bring actions to enjoin a merger and they often exercise that right.

But the Hart-Scott-Rodino Act is a balanced statutory scheme that recognizes the importance of time, and imposes limitations on the period of review. Once that period has expired without federal interference, the parties are free to proceed with the merger. 15 U.S.C. § 18a (b) (1) & (e) (1); H.R. Rep. No. 1373 at 11. Although there is no assurance in the law against future federal action 15 U.S.C. § 18a(i), up to now there have been no federal challenges to mergers that have been cleared through the process. As a practical matter, the law provides a high level of comfort to the business community.

Indeed, this kind of assurance was cited by Congress as a significant advantage of the premerger notification

process. As the Senate Judiciary Committee stated, "[p]remerger notification will also advance the legitimate interests of the business community in planning and predictability. It will enable firms to make post-acquisition changes with much more confidence than they can at present." S. Rep. No. 803 at 65 (quoting with approval testimony by Assistant Attorney General Kauper). The House Judiciary Committee recognized that premerger notification "will advance the legitimate interests of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion." H.R. Rep. No. 1373 at 11. Congress also recognized that premerger review would ease burdens on the courts "by forestalling interminable post-consummation divestiture trials." *Id.*

These significant advantages will be undercut if private parties or states have the power to undo mergers that have already been approved by federal authorities.[8] Federal merger policy should not be undone by private actions for divestiture after closing. It is true that federal enforcement of the merger law has been controversial in some respects, but if substantial numbers of people are dissatisfied with these federal policies, they are subject to change through the political process. This Court should not encourage local and private assaults on federal policies by the expansion of statutory remedies beyond those clearly intended.

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[8] In this case, of course, the Federal Trade Commission imposed a remedial order, after a period of public comment. California, which participated in the comment process, now wants a second chance to have its way. If California can do it in this case, there is nothing to prevent any other state or private party from doing so in the future.

CONCLUSION

In 1914, Congress obviously chose to make a distinction between the equitable remedies available to the federal government and those available to private parties or the states. Congress re-affirmed that distinction in 1976 when it enacted the *parens patriae* legislation in the Hart-Scott-Rodino Act. The reasons for the distinction are even more compelling today.

Because the federal government has advance notice of significant mergers, parties have an opportunity to react in advance and the divestiture remedy is not as important as it once was. At the same time, because of the pressure of international competition, the rationale for a special federal role in the merger area is more compelling today than ever. Extension of merger remedies beyond those clearly granted by statute would be a step in the wrong direction. This Court should affirm the opinion of the Ninth Circuit.

Respectfully submitted,

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